TOBACCO INSTITUTE TESTING LABORATORY PROCEDURES

By letter to the Federal Trade Commission ("FTC") dated December 17, 1970, the tobacco manufacturers voluntarily agreed to disclose tar and nicotine content in their advertising in accordance with an agreed upon program. The program, in pertinent part, states:

> [E]ach company will disclose clearly and prominently for the variety of cigarettes advertised the values for "tar" in milligrams and for nicotine in tenths of a milligram contained in the Federal Trade Commission published test results . . . which are reasonably not expected to be exposed to the public beyond a six month period.

Each of these advertisements will include the "tar" and nicotine data, as rounded off by the Federal Trade Commission, from the Commission test results most recently published in the Federal Register, beginning thirty days after the date of publication. With respect to new product introduction, the program provides:

> If at any time any company undertakes the manufacture or the primary distribution of a new variety of cigarettes to be advertised, it will under this program disclose in its advertising the "tar" and nicotine values determined by that company in its own "tar" and nicotine tests on that new variety conducted in accordance with the present Federal Trade Commission methodology, when it begins the advertising of that new variety.

The Program also includes a procedure for requesting that the FTC conduct a re-test, in conjunction with a test by the Tobacco Institute Testing Laboratory ("TITL"), if the manufacturer determines that the tar and nicotine content of a variety "has become larger or smaller by more than twenty percent of the most recently published rounded Commission results." A manufacturer may utilize TITL results if the Commission does not provide new test results within 45 days of the request.

> In the event that any company determines from test data that the "tar" or nicotine value of any of its varieties available to consumers has become larger or smaller by more than twenty percent of the most recently published rounded Commission test results, that company may request the Commission to conduct a special test on such variety based upon a sample of cigarettes picked up in the marketplace by Western Union, in accordance with arrangements between the Commission and Western Union, with the requesting company bearing all costs of such a pick-up. The requesting company may simultaneously with its request to the Commission, also request the Tobacco Institute Testing Laboratory to obtain from Western Union a similar market pick-up of the variety. If within forty-five working days after the company's request to the Commission, the Commission supplies the company with its test results, the company will thereafter utilize those test results in advertising placed after that date in accordance with this program. If the Commission does not supply test

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results within forty-five working days, then the company will utilize, in accordance with this program test results of the Tobacco Institute Testing Laboratory on the market sample until such time as the Commission test results are made available to it.

In a letter dated July 3, 1978 from the FTC's Division of Advertising Practices to J.E. Wicksham, Philip Morris' Manager of Cigarette Testing Services, the FTC stated that "in instances where a genuine product change has resulted in a change in 'tar' and nicotine values not yet reflected in an FTC report . . . staff has no objection to the use of the 'tar' and nicotine figures derived by the company and disclosed as 'by FTC method' as long as those figures are accurate for the cigarette being described."

Covington & Burling, in a memorandum to the FTC dated June 30, 1987, developed guidelines to resolve the uncertainties resulting from the FTC's decision, on April 15, 1987, to close its in-house testing laboratory and transfer its responsibility to test for "tar" and nicotine values, and to conduct re-tests requested by tobacco manufacturers, to the TITL.

Any Participating or non-Participating Company, as described in this paragraph, shall have thirty (30) working days following receipt of any draft report to demand a retest of any of its cigarette brands or brand varieties included in the report. No more than one retest shall be conducted by the TITL of any cigarette brand or brand variety in connection with any individual test series or report. The final report for any test series shall include, in the case of any brand or brand variety that has been subject to retest, only the numbers generated on the retest. . . . The obligation described in this paragraph shall not apply if (1) the advertised brand has been changed in a way that renders obsolete or inaccurate the "tar" or nicotine rating contained in the most recent TITL report for the advertised brand, (2) the Participating Company is authorized by law to include in its advertising a "tar" or nicotine rating other than the rating contained in the TITL report or (3) the advertised brand is new or for some other reason has not been tested by the TITL. Participating Companies also may include a "tar" or nicotine rating in advertising for a particular brand or brand variety, even if the specific exceptions described immediately above are not met, so long as the applicable TITL rating also is included in the advertising.

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